

**NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT
AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE
RULES. See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.**

FILED BY CLERK

MAR 12 2009

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	
)	
Respondent,)	2 CA-CR 2008-0355-PR
)	DEPARTMENT B
v.)	
)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
PARVIS JOHNNARY FIALLOS-)	Rule 111, Rules of
RIVAS,)	the Supreme Court
)	
Petitioner.)	
)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20064278

Honorable Howard Hantman, Judge

REVIEW GRANTED; RELIEF DENIED

Parvis Johnnary Fiallos-Rivas

Tucson
In Propria Persona

B R A M M E R, Judge.

¶1 Pursuant to a plea agreement, petitioner Parvis Johnnary Fiallos-Rivas was convicted of aggravated assault, a class three felony. The trial court sentenced Fiallos-Rivas to a partially mitigated prison term of three years, giving him 110 days' credit for presentence

incarceration. In this petition for review, he challenges the trial court's denial of his request for post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., asserting that he is being held by the Arizona Department of Corrections (ADOC) beyond the term of imprisonment. *See* Ariz. R. Crim. P. 32.1(d). Absent an abuse of discretion, we will not disturb the court's ruling. *See State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007).

¶2 In its order denying relief, the trial court first reviewed the procedural history of this case. The court treated Fiallos-Rivas's notice of post-conviction relief as both his notice and pro se petition. The court also stated that, although counsel had been appointed, Fiallos-Rivas had difficulty contacting counsel and, it appeared, did not receive assistance. The court then addressed the claim Fiallos-Rivas had raised but found he was not entitled to relief. The court gave Fiallos-Rivas additional time to contact counsel and gave him sixty days, or until December 19, 2008, to file a supplemental petition for post-conviction relief. About two weeks after the court entered that order, Fiallos-Rivas filed his petition for review in which he reiterates the claim that he is being held by ADOC beyond his release date. He does not complain that he was unable to consult counsel. We regard his petition for review as a waiver of the right to have counsel assist him and file a supplemental brief. We therefore consider the court's order of October 14, 2008, to be the final order in this post-conviction proceeding.

¶3 Relying on A.R.S. § 41-1604.14, Fiallos-Rivas contends, as he did below, that, because he has served more than fifty percent of his three-year sentence, ADOC erroneously

refused his request to be released. The statute provides that ADOC “may release a prisoner to the custody and control of the United States immigration and customs enforcement if” certain enumerated requirements have been satisfied. The following are among those requirements: the director of ADOC has received a deportation order for the defendant; the defendant has served one-half of the sentence imposed; the defendant was not convicted of certain kinds of offenses, including sexual offenses; and the defendant was not sentenced under certain specified statutes. At Fiallos-Rivas’s sentencing hearing, both he and his counsel acknowledged he was being deported, although he has not supported his petition with a copy of an order of deportation. In the letter attached to Fiallos-Rivas’s notice of post-conviction relief, ADOC stated Fiallos-Rivas was not “eligible for this half time release noted in” the statute because of “prior commitments.”

¶4 As the trial court correctly found in denying post-conviction relief, “[t]he use of the word ‘may’ in A.R.S. § 41-1604.14 grants ADOC broad discretion to approve or deny early release under the statute.” *See City of Chandler v. Ariz. Dep’t of Transp.*, 216 Ariz. 435, ¶ 15, 167 P.3d 122, 127 (App. 2007) (“[W]hen the Legislature makes the conscious choice to leave the word ‘may’ in the statute as opposed to substituting the word ‘shall’, we presume the Legislature intended the statute to grant discretion as opposed to imposing a mandatory obligation.”). Thus, Fiallos-Rivas’s contention that the statute “requires [he] be released after serving 50% of [his sentence]” is incorrect. The court concluded he had failed to establish ADOC abused its discretion when it denied his request for release, and Fiallos-

Rivas has not established on review that the court abused its discretion in so finding. Apparently, ADOC did not believe Fiallos-Rivas “was eligible” for early release because of what it referred to as “prior commitments.” From the scant record before us, it appears ADOC exercised its discretion under § 41-1604.14, and nothing suggests it did so arbitrarily or capriciously. *See State v. Calderon*, 171 Ariz. 12, 13, 827 P.2d 473, 474 (App. 1991) (abuse of discretion occurs if court’s actions arbitrary or capricious).

¶5 The petition for review is granted, but for the reasons stated, relief is denied.

J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

PHILIP G. ESPINOSA, Judge